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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

NO. **1228** 97

J. GORDON MACK, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT AND BRIEF
IN SUPPORT THEREOF.**

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COMMISSIONER OF INTERNAL REVENUE,
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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

*To the Honorable Chief Justice and Associate
Justices of the Supreme Court
of the United States:*

The petition of J. Gordon Mack respectfully shows:

Opinions Below.

The opinion of The Tax Court of The United States, rendered February 29, 1944, is reported in 3 T. C. 390 (R. 24 a). The opinion of the Circuit Court of Appeals, rendered March 1, 1945 (R. 40) is reported in 148 F. (2d) 62.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 1, 1945 (R. 40). The jurisdiction of

this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, U.S.C.A. Title 28, Section 347. This petition is timely under U.S.C.A., Title 28, Section 350.

Question Presented.

The ultimate issue presented is whether or not an option to purchase shares of stock at one-half the market value from testamentary trustees has a value which, having been exercised, should be included in the basis of such shares on their subsequent sale by the owner of the option in 1940.

Statutes Involved.

The relevant provisions of the Internal Revenue Code, Act of Feb. 10, 1939, 253 Stat. 1 as applicable to the calendar and taxable year 1940, are set forth in the Appendix, *infra*.

Short Statement of Facts.

The pertinent facts, found by The Tax Court of The United States (R. 24 a) to be stipulated (R. 14 a) may be summarized as follows:

On September 27, 1940, petitioner's father, John S. Mack, died leaving a will by the provisions of which he left certain property to trustees and directed that they set aside a certain number of shares of the common capital stock of the G. C. Murphy Company for the benefit of petitioner, and that at any time during the first ten years after decedent's death, the petitioner was given the option to purchase ten thousand of said shares, or any part thereof, from the trustees at any

time, or from time to time, at one-half the mean between the high and the low of the market price of said stock during the six calendar months immediately preceding the date of any purchase.

On November 25, 1940, the petitioner exercised his option in part and acquired five shares of said stock from the trustees and paid the trustees a sum of money equal to one-half of their market value, (calculated as above) to wit, \$170.30 or \$34.06 per share. The fair market value of the five shares on September 27, 1940, the date of the death of John S. Mack, the decedent, was \$78.00 per share. The mean between the high and the low of the market price of said stock during the six calendar months immediately preceding the date of the purchase of the five shares by the petitioner was \$67.625 per share and for the six calendar months ended August 31, 1940 (the last full month prior to decedent's death), the mean between the high and the low of the market price of said shares was \$69.50 per share (R. 15 a).

On December 31, 1940, the petitioner sold the five shares and realized on said sale the amount of \$346.12, or \$69.224 per share.

In his income tax return for the year 1940, the petitioner reported a short term capital loss on said transaction of \$14.18 on the theory that his adjusted basis was fair market value of the option as of September 27, 1940, plus the money paid by him for the shares.

The respondent in his determination changed the basis or cost of the stock from \$72.06 per share to \$34.06 per share by allowing as a basis only the cash paid by petitioner for said five shares.

Other 1940 sales of capital assets not in dispute resulted in a short term capital gain of \$113.83. Consequently, petitioner reported a net short term capital gain for 1940 in the amount of \$99.65 (\$113.83 less \$14.18).

The Tax Court of The United States approved the determination of the respondent (R. 24 a). On appeal to the Circuit Court of Appeals for the Third Circuit, the decision of The Tax Court was affirmed (R. 40).

Specification of Errors to Be Urged.

The Court below erred in holding that, where petitioner acquired a valuable option to purchase stocks, by bequest in the will of his deceased father; and where the petitioner exercised the option and sold the shares thus acquired, petitioner could not use as his adjusted basis the value of the option as of the date of death of his father, plus the cash paid by petitioner for the stock under the option.

Reasons for Granting the Writ.

This Court should review by certiorari the decision of the Circuit Court of Appeals for the Third Circuit for the following reasons:

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Joseph W. Robinson v. Commissioner*, 59 F. (2d) 1008; is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Hawke v. Commissioner*, 109 F. (2d) 946; is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Estate of Edward J. Con-*

nolly, 135 F. (2d) 64, and is probably in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. Matheson*, 82 F. (2d) 380.

2. The decision of the Circuit Court of Appeals is in conflict with a decision of this Court in *Commissioner of Internal Revenue v. Smith*, 65 S. Ct. Rep. 591, not yet officially reported.

3. The decision of the Circuit Court of Appeals is in conflict with the local law of Pennsylvania which has always been that an option to purchase stock or other property from the executors or trustees of a decedent's estate at only a portion of the market price is a bequest or devise under the will.

4. The decision of the Circuit Court of Appeals, in holding that an option to purchase stock from the trustees of a decedent's estate at one-half the market price, where such option is actually exercised by the legatee or beneficiary, was of no value, is contrary to the decisions of the Supreme Court of Pennsylvania in the case of *Hanna's Appeal*, 31 Pa. 53, *Bayer v. Walsh*, 166 Pa. 38, and *Dilworth's Estate*, 243 Pa. 475.

5. The Circuit Court of Appeals erred in its decision.

Conclusion.

Wherefore, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, to the end that the above cause may be certified and deter-

mined by this Court as provided in Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, U.S.C.A. Title 28, Section 347, and that the judgment of the said Circuit Court of Appeals in the above-entitled case may be reviewed by this Court, and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

J. GORDON MACK,
Petitioner.

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